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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JERRY MULLENS,	)	Case No. CV 09-9118-RSWL (DTB)
	)	
Petitioner,	)	
	)	ORDER DENYING PETITIONER'S
vs.	)	MOTION FOR RECONSIDERATION
	)	UNDER RULE 60(b)
KELLY HARRINGTON,	)	
Warden,	)	
	)	
Respondent.	)	

**PROCEEDINGS**

On December 11, 2009, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Pet.") herein. The Petition purported to be directed to petitioner's 2007 conviction in Los Angeles County Superior Court of attempted murder and shooting at an occupied vehicle, as well as true findings on the sentence enhancement allegations that petitioner personally discharged a firearm and that the offenses were committed for the benefit of a criminal street gang. The Petition stated the following two grounds for relief: (1) The evidence was insufficient to support the finding that the attempted murder was willful, deliberate, and premeditated; and (2) the evidence was insufficient to support the true finding on the criminal street gang enhancement. (Pet. at 5.) In support of his claim in Ground Two, petitioner stated,

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1 “[g]ang evidence proved an inflammatory biased jury trial, thus violating petitioner’s  
2 Constitutional Due Process.” (Pet. at 5.)

3 In accordance with the Court’s January 5, 2010, Order Requiring Response to  
4 Petition, respondent filed a Motion to Dismiss (“Motion”) on February 3, 2010,  
5 wherein respondent contended that Ground Two of the Petition included an  
6 unexhausted claim - that the admission of the gang evidence violated petitioner’s  
7 federal constitutional rights. In a Minute Order issued on May 28, 2010, the Court  
8 advised petitioner that, based on its review of his Petition for Review to the California  
9 Supreme Court, the Court was inclined to concur with respondent that Ground Two  
10 contained an unexhausted claim. Accordingly, unless petitioner (a) convinced the  
11 Court otherwise, (b) filed a notice to the effect that he was withdrawing his  
12 unexhausted claim and electing to go forward solely on the insufficiency of the  
13 evidence claim alleged in Ground Two (which the Court would construe as  
14 corresponding to the insufficiency of the evidence claim presented in petitioner’s  
15 Petition for Review), or (c) requested that the Court hold the Petition in abeyance  
16 while he returned to state court to exhaust his state remedies with respect to his  
17 currently unexhausted claim and also made the requisite showing of good cause under  
18 Rhines v. Weber, 544 U.S. 269, 277, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005) for  
19 his failure to exhaust his claims first in state court,<sup>1</sup> the Court would be compelled to  
20 recommend the dismissal of the Petition without prejudice as a “mixed petition.”  
21 Petitioner failed to respond to the Court’s May 28, 2010 Order and, therefore, on  
22 September 13, 2010, the Court issued its Report and Recommendation wherein it  
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24 <sup>1</sup> The Court further advised petitioner that, if he requested that the Court  
25 hold the Petition in abeyance while he returned to state court to exhaust his state  
26 remedies with respect to his currently unexhausted claim, he would also need to  
27 satisfy two other prerequisites to invoking the stay and abeyance procedure--*i.e.* that  
28 the unexhausted claims not be “plainly meritless” and that petitioner not have engaged  
in “abusive litigation tactics or intentional delay.” Rhines, 544 U.S. at 277-78.

1 recommended that respondent's Motion be granted and directed petitioner to either  
2 file a First Amended Petition limited to his already exhausted federal constitutional  
3 claims (*i.e.*, Ground One and the insufficiency of the evidence claim alleged in  
4 Ground Two) or a notice of withdrawal of his unexhausted claim in Ground Two  
5 within 20 days of the filing of the Report and Recommendation, or Judgment would  
6 be entered denying the Petition and dismissing this action without prejudice for failure  
7 to exhaust state remedies. As petitioner failed to file either a First Amended Petition  
8 or a notice of withdrawal of his unexhausted claim, on October 25, 2010, the District  
9 Court adopted the Report and Recommendation and entered Judgment, granting the  
10 Motion and dismissing the action without prejudice. On June 6, 2011, petitioner filed  
11 a Notice of Appeal. On August 9, 2011, the Ninth Circuit denied petitioner's request  
12 for a certificate of appealability on the grounds that he had failed to timely file a  
13 notice of appeal.

14 On May 29, 2012, petitioner filed a "Motion to Reopen Final Judgment and  
15 Relief from Final Judgment Pursuant to Rule 60(b)(6) of the Federal Rules of Civil  
16 Procedure" ("Rule 60 Motion"). In his Rule 60 Motion, petitioner purports to be  
17 seeking relief from the Judgment under Rule 60(b)(6). In response to petitioner's  
18 Rule 60 Motion, on June 29, 2012, the Court issued an Order re Further Proceedings  
19 wherein the Court advised petitioner that he bore the burden of demonstrating that he  
20 had been diligent in seeking relief from the Judgment, and that he was not responsible  
21 for the delay. In order to afford petitioner the opportunity to provide a factual basis  
22 for his delay in seeking relief, petitioner was ordered to submit a supplemental brief  
23 and declaration setting forth the specific facts and extraordinary circumstances which  
24 delayed him from seeking relief from the Judgment. On November 6, 2012, after two  
25 extensions of time, petitioner filed a Supplemental Brief and Declaration in support  
26 of his Rule 60 Motion.

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28 The Court has now reviewed and considered petitioner's Rule 60 Motion, as

1 well as his Supplemental Brief and Declaration. As set forth herein, the Court  
 2 recommends that the Motion be denied.

### 4 ANALYSIS

5 In his Motion, petitioner alleges the following: That the District Court's  
 6 dismissal of the Petition without informing petitioner of the three step stay and  
 7 abeyance procedure set forth in Rhines v. Weber, 544 U.S. 269, 277, 125 S. Ct. 1528,  
 8 161 L. Ed. 2d 440 (2005) and Kelly v. Small, 315 F.3d 1063, 1069-71 (9th Cir. 2002),  
 9 resulted in prejudicial error, and that the failure of the District Court to allow  
 10 petitioner to delete the unexhausted claims and proceed with the exhausted claims  
 11 unreasonably impaired petitioner's right to obtain federal relief. (Rule 60 Motion at  
 12 9, 11.)

13 Rule 60(b) of the Federal Rules of Civil Procedure provides:

14 On motion and upon such terms as are just, the court may relieve  
 15 a party . . . from a final judgment, order, or proceeding for the following  
 16 reasons: (1) [M]istake, inadvertence, surprise, or excusable neglect; (2)  
 17 newly discovered evidence which by due diligence could not have been  
 18 discovered in time to move for a new trial under Rule 59(b); (3) fraud  
 19 (whether heretofore denominated intrinsic or extrinsic),  
 20 misrepresentation, or other misconduct of an adverse party; (4) the  
 21 judgment is void; (5) the judgment has been satisfied . . .; or (6) any  
 22 other reason justifying relief from the operation of the judgment.

23  
 24 Rule 60(b)(6) is a "catch-all provision" that allows a court to vacate a judgment  
 25 "for any other reason justifying relief." Lehman v. U.S., 154 F.3d 1010, 1017 (9th  
 26 Cir. 1998). The Ninth Circuit has cautioned that Rule 60(b)(6) is to be "used  
 27 sparingly as an equitable remedy to prevent manifest injustice and is to be utilized  
 28 only where extraordinary circumstances prevented a party from taking timely action

1 to prevent or correct an erroneous judgment.” Harvest v. Castro, 531 F.3d 737, 749  
2 (9th Cir. 2008) (quoting Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1103  
3 (9th Cir. 2006)). In this regard, “a party seeking to reopen a case under Rule 60(b)(6)  
4 must demonstrate both injury and circumstances beyond his control that prevented  
5 him from proceeding with the prosecution or defense of the action in a proper  
6 fashion.” Id. (internal quotations omitted). While Rule 60(b)(6) does not particularize  
7 any factors that must be met before relief is proper, the Supreme Court has also  
8 cautioned that Rule 60(b)(6) should be used sparingly and only under “extraordinary  
9 circumstances.” Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864,  
10 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

11 Here, petitioner has failed to set forth a basis upon which relief may be granted  
12 under Rule 60(b)(6), or under any of the grounds provided for in Rule 60(b). For  
13 instance, petitioner has failed to present any newly discovered evidence, or  
14 misconduct by the prosecution. Fed. R. Civ. P. 60(b)(1)-(3). Nor has petitioner  
15 identified any reason to declare the Judgment void or any intervening circumstances  
16 that render the Judgment no longer equitable. Fed. R. Civ. P. 60(b)(4),(5). Finally,  
17 petitioner has failed to identify any extraordinary circumstances which might warrant  
18 relief under Fed. R. Civ. P. 60(b)6.

19 Contrary to petitioner’s assertions in his Rule 60 Motion, the District Court  
20 advised him - twice - during the pendency of the underlying action that the Petition  
21 contained an unexhausted claim, and, therefore, that he either had to withdraw the  
22 unexhausted claim or seek a stay and abeyance of the action for purposes of  
23 exhausting the deficient claim in state court. In its Minute Order dated May 28, 2010,  
24 the Court informed petitioner that it was inclined to agree with respondent that  
25 Ground Two of the Petition appeared to include an unexhausted subclaim and, that  
26 unless he could show that this subclaim had been properly exhausted, he would either  
27 have to withdraw it or seek stay and abeyance under Rhines. Otherwise, the action  
28 would have to be dismissed as a “mixed” petition containing both exhausted and

1 unexhausted claims. (Dkt. No. 12.) In spite of this admonition, petitioner failed to  
2 advise the Court as to the procedural course he intended to follow. Accordingly, on  
3 September 13, 2010, the Magistrate Judge issued a Report and Recommendation  
4 wherein the Magistrate Judge referenced the May 28, 2010 Order regarding the  
5 unexhausted subclaim, as well as petitioner's options relating thereto, and also  
6 recommended that the action be dismissed without prejudice unless petitioner limited  
7 his Petition to his exhausted claims. (Dkt. No. 13.) Petitioner again failed to respond  
8 and otherwise failed to file objections to the Report and Recommendation. Thereafter,  
9 the District Judge accepted the Report and Recommendation and entered Judgment  
10 on October 25, 2010, dismissing the action without prejudice. Following the  
11 dismissal, petitioner took no action for more than eight months before filing a Notice  
12 of Appeal.


13 Petitioner has provided this Court with no facts which would provide a basis  
14 for relief from the Judgment entered on October 25, 2010. Moreover, petitioner has  
15 failed to meet his burden of demonstrating that extraordinary circumstances prevented  
16 him from taking action in a timely manner to correct any error in the Judgment.  
17 Harvest, 531 F.3d at 749. Petitioner has also failed to show that he diligently sought  
18 relief from the Judgment following its entry. Indeed, petitioner's initial response to  
19 the Judgment was to file a Notice of Appeal (albeit nearly eight months after the  
20 Judgment was entered), rather than seeking relief from the Judgment in the District  
21 Court.

22 For the foregoing reasons, petitioner's Rule 60 Motion is denied.

23 DATED: February 5, 2013

RONALD S.W. LEW

RONALD S. W. LEW  
UNITED STATES DISTRICT JUDGE

25 Presented by: 

26 David T. Bristow  
27 United States Magistrate Judge  
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